

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOANNE M. ROYER,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO:
)	NO: 05-CV-10448-GAO
BLUE CROSS BLUE SHIELD OF)	
MASSACHUSETTS, INC., BLUE CROSS)	
BLUE SHIELD LONG-TERM)	
DISABILITY BENEFIT PLAN, a/k/a)	
OMNIBUS WELFARE BENEFITS)	
PLAN, KEMPER NATIONAL)	
SERVICES, INC., BROADSPIRE)	
SERVICES, INC., AND SHELDON)	
MYERSON, MD.,)	
)	
Defendants.)	
)	

**DEFENDANTS' MOTION FOR LEAVE TO FILE A REPLY
IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS I AND II**

Pursuant to Local Rule 7.1(B)(3), defendants Kemper National Services, Inc., Broadspire Services, Inc. and Sheldon Myerson, M.D. (collectively, "Defendants") move for leave of court to file a Reply in support of their Motion to Dismiss Counts I and II in order to respond to the arguments raised by plaintiff Joanne M. Royer in her Opposition to Defendants' Motions to Dismiss Counts I and II. In support of this motion, Defendants state as follows:

1. Defendants request leave to file a Reply Memorandum in order to respond to the arguments made by Plaintiff in her Opposition memorandum.
2. Defendants' Reply is strictly confined to matters raised by Plaintiff in her Opposition memorandum.
3. Defendants believe that this additional filing will assist the Court when considering

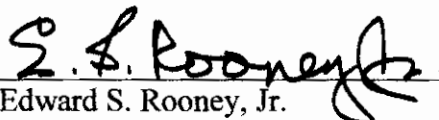
their Motion to Dismiss Counts I and II of the Complaint.

4. Defendants' Reply in Support of Their Motion to Dismiss Counts I and II is filed herewith together with this motion.

For all of the foregoing reasons, Defendants respectfully request that this motion be allowed.

Respectfully submitted,

DATED: September 26, 2005

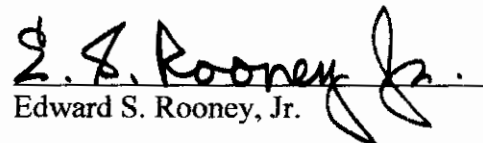

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by regular mail this 26th day of September, 2005.


Edward S. Rooney, Jr.

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SERVICES, INC., AND SHELDON)	
MYERSON, MD.,)	
)	
Defendants.)	
)	

**DEFENDANTS' REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS COUNTS I AND II**

Kemper National Services, Inc. ("KNS"), Broadspire Services, Inc. ("Broadspire")
Sheldon Myerson, M.D. ("Dr. Myerson"), defendants in this matter, for their Reply in Support
their Motion to Dismiss Count III of the plaintiff's Second Amended Complaint state as follows:

The plaintiff correctly points out that there is a split of authority regarding whether
claims administrator may be sued for ERISA Plan Benefits. The plaintiff also correctly points
out that the First Circuit has never held that such a claim is permissible under ERISA.
defendants submit that the majority view which precludes claims for benefits against claims
administrators with no liability for benefits under the terms of the subject ERISA Plan is the
better rule and should be followed by this Court.

Those First Circuit decisions which are cited by the plaintiff are readily distinguishable.
In *Larocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), the plaintiffs sued their employer for

benefits because the employer was the Plan Administrator which had complete control over administration of the Plan. Significantly, the crux of the complaint was that the employer failed to pay benefits to which the plaintiffs claimed they were entitled. Under the circumstances, the employer as the entity which both decided eligibility for benefits and actually paid the benefits was considered a proper defendant. *Id.* at 26.

Likewise, *Pari-Fasano v. ITT Hartford Life and Acc. Ins. Co.*, 230 F.3d 415 (1st Cir. 2000), involved a claims administrator which was also responsible for paying claims out of its own assets through issuance of an insurance policy to the plaintiff's employer. Again, as in *Larocca*, the presence of the claims administrator as the defendant was proper, because the claims administrator was specifically liable under the written terms of the ERISA Plan for benefits which were payable. The only issue which existed was whether a conflict of interest affected the standard of review because of the insurer's interest in deciding whether to pay benefits out of its own pocket. *Id.* at 418.

Here, neither situation in the cases discussed above is present. The claims administrator in this matter, KNS and Broadspire, did not pay claims out of their own assets, nor were they responsible for paying benefits under the written terms of the ERISA Plan. As such, the notion that either decision should be extended to permit suits for benefits against entities which decide claims but which do not have liability for paying claims out of their own assets under the terms of the governing ERISA Plan is ill-advised.

The plaintiff cites to an unpublished decision from this District, *Digregorio v. Pricewaterhouse LTD Plan*, 2004 W.L. 1774566 (D. Mass. Aug. 9, 2004), for the proposition that a third-party claims administrator can be sued for ERISA Plan benefits even though the Plan itself, does not contemplate the administrator paying benefits. The court concluded that a claim

administrator which had no liability under the terms of the Plan to pay benefits could still sued for benefits despite the unequivocal provision under §502(d)(2) of ERISA, 29 U.S.C. §1132(d)(2), that a money judgment against the Plan is enforceable only against the Plan unless liability is otherwise established under the subchapter.

Broadspire respectfully submits that *Digregorio* was wrongly decided and that the First Circuit would not (or should not) adopt the minority view espoused by the District Court that an entity not otherwise liable for payment of Plan benefits can be named as a defendant in such suit.

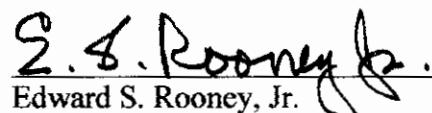
As stated in the defendants' motion, the plaintiff has named Lumbermens as a defendant. The ERISA Plan identifies Lumbermens as the entity responsible for payment of any benefits. As such, KNS, Broadspire, Dr. Meyerson are not proper defendants and should be dismissed from Counts I and II pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

KEMPER NATIONAL SERVICES, INC., BROADSPIRE
SERVICES, INC. AND SHELDON MEYERSON, M.D.

By their attorneys:

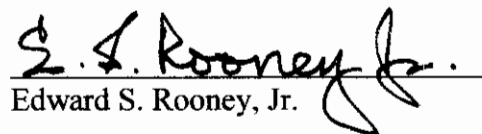
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